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PROPER DESIGNATION OF MARRIED WOMEN IN LEGAL PROCEEDINGS.

NAMES IN GENERAL.

A name is one or more words used to distinguish a person.[1]

"Since the days of William the Conqueror, by the common law, a name consists of a given name, called Christian name, because given in Christian baptism, and a surname, which is the family name or patronymic." [2]

The right of a person to change his name at common law is too well recognized to need the citation of authority. In legal theory, however, the rule is important as the basis of a number of the doctrines hereinafter discussed.

LEGAL NAME OF WIFE.

The law confers upon a wife the surname of her husband.[3] A wife's Christian name remains unchanged by marriage. A married woman should be impleaded by her own Christian name followed by her husband's surname.[4]

USE OF "MRS."

The abbreviation "Mrs." is not a Christian name, but a mere title, though it usually indicates that the person named is a married woman.[5]

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1. Slingluff *v.* Gainer, 49 W. Va. 7, 9, 37 S. E. 771.

2. Brannon, J., in Slingluff *v.* Gainer, 49 W. Va. 7, 9, 37 S. E. 771.

3. Freeman *v* Hawkins, 77 Tex. 498, 19 Am. St. Rep. 769.

4. Ratcliffe *v.* McDonald's Adm'r (Va.), 97 S. E. 307; Elberson *v.* Richards, 42 N. J. L. 69, 70 (foreign attachment proceeding).

5. Elberson *v.* Richards, 42 N. J. L. 69, 70, followed in Kearsley *v.* Gibb, 44 N. J. L. 169, 170; and in Schmidt *v.* Thomas, 33 Ill. App. 109, 112. However, in Ballard *v.* St. Albans Advertising Company, 52 Vt. 327, it was held that the use of the title "Mrs." before the name of the plaintiff, Sarah Ballard, raised no presumption that she was a married woman and hence under disability to sue alone, al-

In the social world a married woman is usually known by her husband's Christian name or names (or initials) and a widow is designated by her own Christian name and her husband's surname, with the use of "Mrs." in each case. The artificiality of the legal rule omitting the prefix "Mrs." and using the wife's Christian name with her husband's surname in all cases is apparent.[6]

It is technically correct to omit the title "Mrs." in legal proceedings, but its use is so common that it would even seem to be proper. In any case it would be harmless as surplusage. It is suggested that a better mode of pleading is to give the wife her proper legal name and add the words "wife of ————," or "widow of ————." [7]

USE OF HUSBAND'S NAME.

The designation of a married woman by the name of her hus-

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though the action was to recover under a contract of hiring out the services of her minor son. The court took cognizance of "the large class entitled to be called 'Mrs.'; yet have no husbands by reason of death or divorce."

6. In Carroll *v.* State, 53 Neb. 431, 73 N. W. 939, Harrison, C. J., said: "A married woman takes her husband's surname, and by a social custom, which so largely prevails that it may be called a general one, she is designated by the use of the Christian name, or names, if he has more than one, of the husband, or the initial letter or letters of such Christian name or names of the husband, together with the appellative abbreviation "Mrs." prefixed to the surname; and all married women (there may be, possibly, a few exceptions) are better known by such name than their own Christian name or names, used with their husband's surname, and their identification would be more perfect and complete by the use of the former method than the latter."

7. In Houston, etc., R. Co. *v.* Red Cross Stock Farm, 22 Tex. Civ. App. 114, 53 S. W. 834, where the plaintiff sued as "Mrs. Annie Mitchell, doing business under the names of the Red Cross Stock Farm," and her husband joined her pro forma, it was held that her designation under the name of the Red Cross Stock Farm could be rejected as surplusage.

In Niagara Fire Ins. Co. *v.* Lee (Tex.) 19 S. W. 1030, the joint plaintiff Margaret R. Lee was substituted for her husband, T. H. Lee, as his widow and sole heir. She testified that her name was Rebecca Lee and that she was the widow of T. H. Lee. A judgment in favor of Margaret R. Lee and her co-plaintiff was affirmed, on the ground that she was sufficiently identified.

band has been held sufficient indication in some cases.[8] The practice is not commended but is permissible under another rule, to be presently discussed, that one may be described by the name by which he is commonly known.

DESIGNATION "AND WIFE."

To be made a party, one must be designated by name in the process and judgment. The words "and Wife" are insufficient to make the wife a party to a suit against her husband.[9]

DESIGNATION BY NAME IN COMMON USE.

The general doctrine is that one may be designated in legal proceedings by the name by which he is commonly known, although it is not his true name.[10]

A person who is as well known by one name as another may be sued by either.[11] And it has been held sufficient that a person is known by both names, without requiring that he be equally well known by both names.[12]

The general doctrine applies to the names of females.[13]

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8. In Carroll *v.* State, 53 Neb. 431, 73 N. W. 939, under Neb. Cr. Code, § 579, requiring the names of witnesses to be indorsed on the information, the supreme court, while disapproving the practice, held that designation of Alena Mary Steenburg as Mrs. Fred Steinburg was sufficient identification to permit her to testify for the state, the names Steenburg and Steinburg being idem sonans, and her husband, Paul Fred Steenburg, being known as Fred Steenburg. The court confined the decision to cases where it did not appear that accused was misled as to the identity of the witness or had suffered any prejudice.

In Ansley *v.* Green, 82 Ga. 181, 7 S. E. 921, the court held that a declaration against the purchaser of realty at public auction, for noncompliance with his bid, in the name of Mrs. Alice McPherson Ansley was not demurrable on the ground that the memorandum of sale named the owner as Mrs. Frank J. Ansley, saying that parol evidence was admissible to show that the name used was that of her husband and was meant to apply to her.

9. Sossman *v.* Price, 57 Ala. 204.

10. See cases collected in note in 132 Am. St. Rep. 572, 573.

11. Isaacs *v.* Mintz, 16 Daly (N. Y.) 468, affirming 11 N. Y. S. 423.

12. Young *v.* Jewell, 201 Mass. 385, 87 N. E. 604.

13. An illustration is found in Taylor *v.* Commonwealth, 20 Gratt. (61 Va.) 825, where the accused was indicted for a rape upon Ellen

In a Kansas case it was held that a married woman who had left her husband could sue in the name of her paramour with whom she lived and whose name she had adopted and was generally known by in the community.[14] And in New York a divorced woman who had resumed her maiden name was allowed to sue in that name for breach of marriage promise.[15]

The rule has been held to apply to a married woman who is known by her husband's initials.[16] In such case the question is one of fact and not of law.[17]

USE OF ABBREVIATIONS, ETC.

Judicial notice will be taken of the ordinary and commonly used abbreviations and equivalents of Christian names;[18] but not of nicknames.[19]

Francis Davids and it appeared that the true name of the prosecutrix was Helen Francis Davids. A conviction was affirmed upon proof that she was as frequently called by one name, in the community, as by the other.

14. Clark *v.* Clark, 19 Kan. 522.

15. Rich *v.* Mayer, 7 N. Y. S. 69, 70.

16. Thus in Deets *v.* Smith, 61 Kan. App. 601, 51 Pac. 581, Martha L. Smith, the widow of A. D. Smith, brought an action of replevin as A. D. Smith. A judgment in her favor was affirmed upon her showing that she was the real party in interest, and had signed her name in most business transactions after her husband's death as A. D. Smith, and was as well known by that name as by her own.

17. In Bell *v.* State, 25 Tex. 574, a conviction of George W. Bell of an assault and battery upon Mrs. George W. Bell was reversed because the trial judge instructed the jury that the defendant's wife was correctly described as Mrs. George W. Bell, holding that her proper name was Sallie Bell, and that it should have been left to the jury whether the battery was committed upon the person named in the indictment. This was followed in Davis *v.* State (Tex. Civ. App.), 11 S. W. 647, reversing a conviction of C. Davis for aggravated assault upon Mrs. C. Davis because it was not shown by the prosecution that the injured person was well known by that name.

18. Goodell *v.* Hall, 112 Ga. 435, 436, 37 S. E. 725 ("Eliza" for "Elizabeth"). See also Barley *v.* Griffith, 8 Leigh (35 Va.) 442 ("Bill" for "William Lee," a slave).

19. Ohlmann *v.* Clarkson Sawmill Co., 222 Mo. 62, 120 S. W. 1155, 28 L. R. A. (N. S.) 432 ("Mike" for "Michael," who was, however, shown to be German and not Irish). It is difficult to draw the line

Good practice would demand that the use of abbreviations be avoided unless the person is better known by that name than by any other, in which case the true name could be given and the abbreviation laid under an alias dictus.[20]

PRESUMPTION OF SEX FROM NAME.

It seems that there is no presumption of sex from the form of a Christian name.[21]

USE OF INITIALS.

The practice of designating persons by initials in legal proceedings has been frequently condemned.[22]

There is a great diversity of opinion upon the subject,[23] as Lord Coke would say. Some courts have adopted the rule that a Christian name is sufficiently indicated by initials, especially in cases where objection is made too late. There is much reason in this view because it is true that many men are known only by their initials, for brevity, convenience, dislike of baptismal names and a variety of other reasons. Such a case would seem to fall within the operation of the principle already stated—that a per-

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between abbreviations and nicknames in many cases. See 29 Cyc. 270, note 42, for illustrations of names which have been held equivalent to each other.

20. 14 Encyc. Pl. & Pr. 281.

21. See Crawford *v.* Slye, 4 Cranch (C. C.) 457; Lamotte *v.* Archer, 4 E. D. Smith (N. Y.), 46. However in Taylor *v.* Commonwealth, 20 Gratt. (61 Va.) 825, 828, a prosecution for rape, it was said: "Both of the names 'Ellen' and 'Frances' are names universally applied to females only * * *." The courts seem more disposed to recognize feminine names than masculine, but in Walling *v.* State, 13 Ala. App. 253, 69 So. 236, the court took judicial notice that while "Willie" is the real Christian name of a girl, yet when applied to a male it is a mere corruption of "William" and the same name.

22. Thus it is said in Slingluff *v.* Garner, 49 W. Va. 7, 9, 37 S. E. 771, that, "Initials are not a name, but only a hasty, careless, substitute for the proper name." The practice was also criticised in Wilson *v.* Shannon, 6 Ark. 196, holding that a plea of misnomer in that defendant "George Taylor" was sued as "Geo. Taylor" was good upon demurrer thereto.

23. See generally 14 Encyc. Pl. & Pr. 273-275; 21 Am. & Eng. Enc. of Law (2nd Ed.) 308, 309; note in 132 Am. St. Rep. 573-579.

son known by two names may be designated by either. There are other authorities holding that in the absence of a contrary showing it will not be presumed that a person has any other Christian name than the initials used.[24] The earlier cases confined the rule to vowel initials but it has long been extended to consonants also. The presumption should be in accord with the general rule, or certainly with the majority of cases, and should not be based upon a mere possibility.

The better solution would perhaps seem to be a frank admission that the presumption is to the contrary (that the initials represent names) and a holding that under modern usage they serve the purpose of identification sufficiently in the absence of timely objection. The establishment of a legal presumption contrary to fact in a vast majority of cases, except for sufficient reason, is at least undesirable.

There is a growing tendency to eliminate defenses and objections not going to the merits of a cause, as shown by numerous statutes, but the careful lawyer will avoid the use of initials wherever it can be done

Use of Middle Name.

The middle name may be given or omitted, under the common law doctrine that while a person could have divers surnames he could have but one Christian name;[25] so that a middle name was not recognized as a part of one's name. For the same reason it has been frequently held that if the middle name or initial is given and an error is made it is immaterial, although this is disputed by some of the American Courts, and it is held by a few courts that a middle name is or may be a part of a person's name.[26] And it would seem that the common law rule should

24. Thus Chief Justice Marshall in Breedlove *v.* Robeson, 32 U. S. (7 Pet.) 413, 431, said: "The plaintiff Sigg is denominated in the petition and writ J. J. Sigg. The omission of his Christian name at full length is alleged to be error. He may have had no Christian name. He may have assumed the letters 'J. J.' as distinguishing him from other persons of the surname of Sigg."

25. Co. Litt. 3a; Rex *v.* Newman, 1 Ld. Raym. 562, 91 Eng. Reprint 1275.

26. See authorities collected in 14 Encyc. Pl. & Pr. 275-277; notes in 14 L. R. A. 690, and 132 Am. St. Rep. 566-569.

give way here, as the reason therefor has disappeared. Middle names are in common use today, and the union of church and state in England, which prevented a person from having but one baptismal name, does not exist in the United States.[27]

A qualification of the majority doctrine has been announced to the effect that when only the initial of the first name is given, the middle initial is then to be considered a part of the person's name.[28]

In Virginia it seems that the majority rule that the middle name is immaterial is adopted.[29]

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27. The general rule is stated by Judge Brannon in Slingluff *v.* Gainer, 49 W. Va. 7, 9, 37 S. E. 771, that, "A middle name or initial is in law no part of the name, though practically it is some times useful as a means of identification but it may be omitted from a document without prejudice to it. The law from William of Normandy continues as just stated down to this day." In the earlier case of Long *v.* Campbell, 37 W. Va. 665, 17 S. E. 197, Judge Brannon expressed his dissatisfaction with the rule as follows: "For purposes of identification the middle name may be very important, as where the question is which one of two men of the same name, except that they have different middle names, or only one has a middle name, did a certain act, or was injured or sued, or the like. And I cannot say that the rule is very reasonable as a man, contrary to the idea stated in the old books that a man can have put one Christian name, may by baptism, confirmation, or otherwise take and use two as well as one Christian name; but the rule stated seems to be well settled."

28. See English *v.* State, 30 Tex. Cr. App. 471; King *v.* Clark, 7 Mo. 269; Bowen *v.* Mulford, 10 N. J. L. 230.

29. In Ming *v.* Gwatkin, 6 Rand. (27 Va.) 551, where the writ and bail bond in a capias ad respondendum, in debt, were in the name of Mary G. Gwatkin as plaintiff, and the declaration and default judgment were in the name of Mary S. Gwatkin, the variance was held fatal.

But in the case of Dabneys *v.* Knapp, 2 Gratt. (43 Va.) 355 a default judgment for the plaintiff in assumpsit was affirmed where the writ was issued in the name of Samuel P. Christian, as one of the partners, and the declaration was in the name of Samuel B. Christian; the judgment being in favor of the firm.

And the earlier case of Ming *v.* Gwatkin was said to be doubtful in Long *v.* Campbell, 37 W. Va. 66, 17 S. E. 197, 198, and was distinguished as a decision under a statute not curing defects in judgments by default.

It is safer, therefore, to omit the middle name or initial of a married woman, where it cannot be learned or where its correctness is doubtful.

IDEM SONANS.

The rule of idem sonans, which probably finds most frequent application in the case of indictments and criminal proceedings, applies equally to civil cases. The rule has been well stated thus: "It matters not how two names are spelled, what their orthography is; they are idem sonans within the meaning of the books, if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long continued usage has by corruption or abbreviation made them identical in pronunciation." [30]

This doctrine is, of course, applicable to the name of a married woman.[31]

The question whether two names are idem sonans is one for the jury and not for the court.[32]

"SENIOR" OR "JUNIOR."

As the husband's surname is applied to a married woman under all of the rules, the question could easily arise whether "junior" or "senior" constitutes a part of the wife's legal name.

It is well settled that the suffix "Jr." is no part of a man's name.[33] And the law is the same with respect to "Sr." [34] But where a father and son have the same name, prima facie the father is intended where the name is used without adding "senior" or "junior." [35]

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30. Robeson *v.* Thomas, 55 Mo. 581, 583, approved in Whelen *v.* Weaver, 93 Mo. 430, 432.

31. Carroll *v.* State, 53 Neb. 431, 73 N. W. 939.

32. Taylor *v.* Commonwealth, 20 Gratt. (61 Va.) 825, 829.

33. O'Bannon *v.* Saunders, 24 Gratt. (65 Va.) 138, 146.

34. Neil & Ferguson *v.* Dillon, 3 Mo. 59. The cases on the subject are considered in an exhaustive note to Harris *v.* State, 23 Wyo. 487, 153 Pac. 881, in Ann. Cas. 1917A, 1211-1216.

35. See cases collected in 14 Encyc. Pl. & Pr. 291; and notes in 14 L. R. A. 691, and Ann. Cas. 1917A, 1215.

In King *v.* Peace, 3 Barn. & Ald. 579, 106 Eng. Reprint 773, the defendant was indicted for an assault and battery upon Elizabeth Edwards. It appeared at the trial that there were two persons of

Hence it is unnecessary to describe either a married woman or a single one as "Senior" or "Junior," "Elder" or "Younger," etc.

NOTICE BY PUBLICATION.

The considerations applicable to notice by publication are somewhat different from those relating to common law process.

Constructive service is purely statutory and statutes authorizing it are to be strictly construed as in derogation of the common law and of common rights. Nor are the courts inclined to favor proceedings by publication, especially when coupled with an attachment or other harsh remedy.

Actual service of process is equivalent to saying to the defendant, "Thou art the Man." If he is improperly named he can plead the misnomer in abatement or have it corrected on motion. Service by publication is based upon superimposed presumptions: First, that the defendant will see the notice; second, that if he sees it he will know that it is intended for him. The latter presumption is grossly unfair where the notice varies the name of the defendant. It is at least reasonable to say that when John A. Smith sees a notice of publication directed to John E. Smythe, he has a right to presume that it is meant for another of the numerous family of Smiths, and one who has adopted a different spelling for better identification, instead of holding that he must apply the legal doctrine of idem sonans and recognize the misspelt name as his own. In addition to which, he should not be expected to know that the middle name (or initial) his parents gave him and he has borne all his life, mayhap to the exclusion of his Christian name, is not his name in law because, forsooth, the companions of William the Conqueror, some nine centuries ago, had only two names. The reason becomes more flimsy when one learns from the history of that period that many of them had only one name, and some of them were entitled to none in law. Indeed surnames did not

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that name, mother and daughter, and that in fact the assault had been committed upon the daughter. Counsel ingeniously objected that the name in the indictment must be presumed to be that of the elder of the two of that name and that hence proof of an assault upon the younger constituted a fatal variance, but the objection was overruled and the defendant's conviction was sustained.

come into use in England until the middle of the fourteenth century.[36]

Publication of process against a defendant by initials only is ineffectual as a notice, except under special circumstances.[37]

A mistake in initials or in the order of the initials also vitiates notice by publication.[38]

A majority of the decisions hold that a mistake as to the middle initial is immaterial in notice by publication, under the rule that the law recognizes but one Christian name.[39]

Constructive service of process is also invalidated by the use of a nickname, as "Mike" for "Michael." [40]

The authorities seem equally divided as to the validity of publication of process against a married woman in her maiden name.[41] It must be admitted that the question presents special difficulties and both views seem reasonable. In the absence of controlling authority much may depend upon the nature and facts of the particular case before the court. The chance that the defendant will actually see the published notice does not enter into the decision, for theoretically it is neither greater nor less than in the case of any other defendant and argument on that point merely questions the validity of all service by publication. As to the second proposition in constructive service, that if the defendant sees the notice he will know it is meant for him, a stronger case is made than in the case of a notice using an incorrect name. Assuming that a woman's maiden name is

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36. See Petition of Snook, 2 Hilt. (N. Y.) 466, quoted at length in 132 Am. St. Rep. 564, et seq.

37. Butler *v.* Smith, 84 Neb. 78, 120 N. W. 1106, and note in 28 L. R. A., N. S., 436.

38. Buchanan *v.* Edmisten (Neb.), 95 N. W. 620; Fanning *v.* Krapfl, 61 So. 417, 14 N. W. 727, 16 N. W. 293.

39. Illinois, etc., R. Co. *v.* Hasenwinkle, 232 Ill. 224, 83 N. E. 815, and cases cited in note thereto in 15 L. R. A., N. S., 129; White *v.* Lumber Co., 240 Mo. 13, 139 S. W. 553, and cases cited in note thereto in 42 L. R. A., N. S., 151.

40. Ohlmann *v.* Clarkson Sawmill Co., 222 Mo. 62, 120 S. W. 1155, 28 L. R. A., N. S., 432 (Judge Lamm's eulogy on "Mike" in the opinion is recommended for light reading).

41. Emery *v.* Kipp (Cal.) 91 Pac. 17, and cases cited in note thereto in 19 L. R. A., N. S., 984.

correctly stated, it is a name by which the defendant has been known, and the proper name by which she should have been sued in the past. Nor is it unreasonable to presume that a married woman will remember and recognize her maiden name after being known by that name, and receiving mail so addressed for years, and to hold that she should be put upon inquiry thereby. Notice by such name would seem to be the only proper procedure in the case of a divorced woman who has resumed her maiden name by decree of court and is so known in the community.[42] Moreover it seems that some account should be taken of the difficulty of knowing when or whom a woman will marry or whether she will marry at all, when she has moved from a community without leaving any forwarding address. However, the practice is one to be avoided where the husband's name can be learned.

The doctrine of idem sonans is conceded by most courts to be applicable to constructive service of process, but greater strictness is observed as to identity of sound, and the application of the rule in such case is regarded by all the courts with disfavor.[43]

It is a clear inference from the cases that a notice by publication omitting the Christian name of the defendant is void, even though it states the name of the husband and describes the other defendant as his wife.[44]

Objections and Waiver.

At common law misnomer of a defendant could only be taken advantage of by plea in abatement.[45]

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42. Compare Rich *v.* Mayer, 7 N. Y. S. 69, 70.

43. See Steinman *v.* Jessee, 108 Va. 567, 62 S. E. 275; Schoenfeld *v.* Bourne, 159 Mich. 139, 123 N. W. 537, and cases collected in note thereto in 30 L. R. A., N. S., 122.

44. See Thompson *v.* McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334 (widow); and Whitney *v.* Masemore (Kan.) 89 Pac. 914, and cases in note thereto in 11 L. R. A., N. S., 676 (process directed to "———— Whitney, and ———— Whitney, her husband)."

45. 14 Encyc. Pl. & Pr. 295, et seq.; Handley *v.* Ludington, 4 W. Va. 53 (one defendant sued as "H. D. McClintic" without giving his full Christian name).

It is elementary that a misnomer is waived by the defendant's appearance by his true name or pleading to the merits, and that the plea in abatement must give his full and correct name.[46] So that the plaintiff is at most merely compelled to amend.[47]

STATUTORY PROVISIONS.

In England the statute of 3 & 4 William IV., c. 42, provided that plaintiff's declaration might be amended by inserting the true name of the defendant in cases of misnomer. Similar statutes are generally in force in the United States.

In Virginia[48] and West Virginia[49] no plea in abatement for misnomer is allowed in any action; but the declaration and summons may, on motion of either party, and on affidavit of the right name, be amended by inserting the same therein.

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46. 14 Encyc. Pl. & Pr. 298, 303.

47. An action commenced by a married woman in her maiden name may be amended by substituting her proper name and joining her husband as party. Glick *v.* Hartman, 10 Iowa 410.

48. Virginia Code 1904, § 3258.

49. West Virginia Code 1887, ch. 125, § 14.